

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY FORSTON,

Plaintiff,

v.

Civil Action 1:22-cv-410
Judge Douglas R. Cole
Magistrate Judge Chelsey M. Vascura

LT. CHARLES HENNESS, *et al.*,

Defendants.

ORDER and REPORT AND RECOMMENDATION

Plaintiff, Timothy Forston, an Ohio inmate who is proceeding without the assistance of counsel, brings this civil rights action under 42 U.S.C. § 1983 against nine corrections officers employed at Warren Correctional Institution (“WCI”), alleging that Defendants violated his constitutional rights. This matter is before the Court for the initial screen of Plaintiff’s Complaint under 28 U.S.C. §§ 1915(e)(2) and 1915A to identify cognizable claims and to recommend dismissal of Plaintiff’s Complaint, or any portion of it, which is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2); *see also McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997). Having performed the initial screen, for the reasons that follow, the undersigned finds that Plaintiff may proceed on his individual-capacity Eighth Amendment claims against Defendants Hennes and Capella and **RECOMMENDS** that the Court **DISMISS** Plaintiff’s remaining claims pursuant to § 1915(e)(2).

This matter is also before the Court for consideration of Plaintiff's motion for leave to proceed *in forma pauperis* under 28 U.S.C. § 1915(a)(1) and (2), which is **GRANTED**. (ECF No. 1.) Plaintiff is required to pay the full amount of the Court's \$350 filing fee. 28 U.S.C. § 1915(b)(1). Plaintiff's certified trust fund statements reveal that he cannot pay the filing fee because he currently possesses only \$13.99 in his prison account.

Pursuant to 28 U.S.C. § 1915(b)(1), the custodian of Plaintiff's inmate trust accounts (Inmate Id Number A332587) at WCI is **DIRECTED** to submit to the Clerk of the United States District Court for the Southern District of Ohio as an initial partial payment, 20% of the greater of either the average monthly deposits to the inmate trust account or the average monthly balance in the inmate trust account, for the six-months immediately preceding the filing of the Complaint.

After full payment of the initial, partial filing fee, the custodian shall submit 20% of the inmate's preceding monthly income credited to the account, but only when the amount in the account exceeds \$10.00 until the full fee of \$350.00 has been paid to the Clerk of this Court. 28 U.S.C. § 1915(b)(2). *See McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997).

Checks should be made payable to: Clerk, United States District Court. The checks should be sent to:

Prisoner Accounts Receivable
260 U.S. Courthouse
85 Marconi Boulevard
Columbus, Ohio 43215

The prisoner's name and this case number must be included on each check.

It is **ORDERED** that Plaintiff be allowed to prosecute his action without prepayment of fees or costs and that judicial officers who render services in this action shall do so as if the costs had been prepaid. The Clerk of Court is **DIRECTED** to mail a copy of this Order to Plaintiff and

the prison cashier's office. The Clerk is further **DIRECTED** to forward a copy of this Order to the Court's financial office in Columbus.

I.

According to his Complaint, in August 2020, while being transported on a medical cart, Defendant Corrections Officer Henness used force to pin Plaintiff over the side of the cart and held his head in such a position that Plaintiff could breathe only exhaust fumes through his mask. Plaintiff hit his head at some point during this cart ride and became dizzy from the exhaust fumes.

In addition, Plaintiff alleges that Defendant Henness subjected him to unnecessary force during transport to receive medical treatment again in April 2022. According to Plaintiff, he sought emergency medical assistance after falling out of his bed and hitting his head. Defendant Henness responded to Plaintiff's call and ordered that Plaintiff be handcuffed behind his back. Plaintiff alleges that Defendant Capella and an unknown corrections officer "tossed [him] onto the gurney like a rag doll," causing Plaintiff to yell out in pain as the force of his body landed on his handcuffed hands. (Pl.'s Compl., ECF No. 1-1 at PAGEID # 20.) Defendant Henness ordered Plaintiff's legs shackled and proceeded to "smash and grind [Plaintiff's] body into the gurney . . . tearing [the] skin on [his] wrist and shin [and] leaving teethmarks and a hole in [his] shin from the shack[les]." (*Id.*)

Plaintiff also alleges that Defendant Henness threw away Plaintiff's photos and property during "pack-up" of his cell. (*Id.* at PAGEID # 15.)

Finally, Plaintiff generally alleges that a number of WCI corrections officers conspired to not report or cover up the excessive force incidents he has alleged. (*Id.* at PAGEID # 23.)

Plaintiff states that he is suing each Defendant in both their individual and official capacities. He seeks declaratory and monetary relief.

II.

Congress enacted 28 U.S.C. § 1915, the federal *in forma pauperis* statute, seeking to “lower judicial access barriers to the indigent.” *Denton v. Hernandez*, 504 U.S. 25, 31 (1992). In doing so, however, “Congress recognized that ‘a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.’” *Id.* at 31 (quoting *Neitzke v. Williams*, 490 U.S. 319, 324 (1989)). To address this concern, Congress included subsection (e) as part of the statute, which provides in pertinent part:

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

* * *

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted[.] .

28 U.S.C. § 1915(e)(2)(B)(i) & (ii); *Denton*, 504 U.S. at 31. Thus, § 1915(e) requires *sua sponte* dismissal of an action upon the Court’s determination that the action is frivolous or malicious, or upon determination that the action fails to state a claim upon which relief may be granted. *See Hill v. Lappin*, 630 F.3d 468, 470–71 (6th Cir. 2010) (applying Federal Rule of Civil Procedure 12(b)(6) standards to review under 28 U.S.C. §§ 1915A and 1915(e)(2)(B)(ii)).

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a plaintiff must satisfy the basic federal pleading requirements set forth in Federal Rule of Civil Procedure 8(a). Under Rule 8(a)(2), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Although this pleading standard does not require “detailed factual allegations, a

pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action” is insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). Further, a complaint will not “suffice if it tenders naked assertions devoid of further factual enhancement.” *Id.* (cleaned up). Instead, to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, “a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face.” *Id.* (cleaned up). Facial plausibility is established “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* In considering whether this facial plausibility standard is met, a Court must construe the complaint in the light most favorable to the non-moving party, accept all factual allegations as true, and make reasonable inferences in favor of the non-moving party. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008) (citations omitted). The Court is not required, however, to accept as true mere legal conclusions unsupported by factual allegations. *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In addition, the Court holds *pro se* complaints “to less stringent standards than formal pleadings drafted by lawyers.” *Garrett v. Belmont Cty. Sheriff’s Dep’t*, No. 08-3978, 2010 WL 1252923, at *2 (6th Cir. Apr. 1, 2010) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

III.

A. Official-Capacity Claims

The Eleventh Amendment operates as a bar to federal-court jurisdiction when a private citizen sues a state or its instrumentalities unless the state has given express consent. *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1983); *Lawson v. Shelby Cty.*, 211 F.3d 331, 334 (6th Cir. 2000). A suit against a state official in his or her official capacity is “not a suit against the official but rather is a suit against the official’s office,” and is therefore “no different

from a suit against the State itself.” *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989). “There are three exceptions to sovereign immunity: (1) when the state has waived immunity by consenting to the suit, (2) when Congress has expressly abrogated the states’ sovereign immunity, and (3) when the doctrine set forth in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), applies.” *Boler v. Earley*, 865 F.3d 391, 410 (6th Cir. 2017) (citation omitted).

None of the three exceptions apply here. First, “Ohio has not waived sovereign immunity in federal court.” *Mixon v. State of Ohio*, 193 F.3d 389, 397 (6th Cir. 1999). Second, “Section 1983 does not abrogate Eleventh Amendment immunity.” *Boler*, 865 F.3d at 410 (citing *Will*, 491 U.S. at 66). Finally, *Ex Parte Young* does not operate to save Plaintiff’s official-capacity claims. The *Ex Parte Young* exception to sovereign immunity allows a plaintiff “to bring claims for prospective relief against state officials sued in their official capacity to prevent future federal constitutional or statutory violations, regardless of whether compliance might have an ancillary effect on the state treasury.” *Boler*, 865 F.3d at 412 (internal quotation marks and citation omitted). The exception applies where the plaintiff alleges “an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Dubuc v. Mich. Bd. of Law Exam’rs*, 342 F.3d 610, 616 (6th Cir. 2003) (quoting *Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002)). Applied here, *Ex Parte Young* is inapplicable because Plaintiff does not allege any ongoing violations. (See Pl.’s Compl., ECF No. 1-1.) It is therefore **RECOMMENDED** that Plaintiff’s official-capacity claims be **DISMISSED** pursuant to § 1915(e).

B. Individual-Capacity Claims

1. Excessive Force Claims

The Eighth Amendment prohibits the unnecessary and wanton infliction of pain against prisoners. *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). To make out a claim under the Eighth Amendment, the prisoner must

satisfy both an objective and a subjective component. *Id.* (citing *Moore v. Holbrook*, 2 F.3d 697, 700 (6th Cir.1993)).

The objective component requires the pain inflicted to be “sufficiently serious.” *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). Yet the seriousness of the injuries is not by itself dispositive. *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (per curiam). “When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated . . . [w]hether or not significant injury is evident.” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). “Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.” *Id.*

The subjective component focuses on the state of mind of the prison officials. *Williams*, 631 F.3d at 383. The “core judicial inquiry” is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Wilkins*, 449 U.S. at 37 (quoting *Hudson*, 503 U.S. at 7).

Accepting Plaintiff’s allegations as true, the undersigned finds that Plaintiff has plausibly alleged Eighth Amendment claims against Defendants Henness and Capella in their individual capacities arising from the August 2020 and April 2022 incidents. Plaintiff may therefore proceed on these claims.

2. Conspiracy Claims

Courts traditionally view allegations of conspiracy against public officials with “suspicion and disfavor.” *Fisher v. City of Detroit*, 4 F.3d 993 (6th Cir. 1993). Thus, the pleading requirement for a civil conspiracy claim is strict. *BPNC, Inc. v. Taft*, 147 F. App’x 525, 532 (6th Cir. 2005). “It is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim” *Fieger v. Cox*, 524 F.3d 770, 776 (6th Cir. 2008) (internal quotations

omitted). *See also Farhat v. Jopke*, 370 F.3d 580, 599 (6th Cir. 2004) (“Claims of conspiracy must be pled with some specificity: vague and conclusory allegations that are unsupported by material facts are not sufficient to state a § 1983 claim.”).

Applied here, Plaintiff offers only a conclusory statement that a number of WCI corrections officers conspired to not report or cover up the excessive force incidents he has alleged. (*See* Pl.’s Compl., ECF No. 1-1 at PAGEID # 23.) It is therefore **RECOMMENDED** that Plaintiff’s conspiracy claim be **DISMISSED**.

3. Property Deprivation Claim

Plaintiff’s claim against Defendant Henness arising from the alleged destruction of his property must be dismissed because Plaintiff has not sufficiently alleged the inadequacy of the remedies available under Ohio law. *See Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327 (1986) and *Hudson v. Palmer*, 468 U.S. 517 (1984). In *Parratt*, the United States Supreme Court held that the existence of adequate post-deprivation state remedies eliminates any due process claim arising from the negligent deprivation of a prisoner’s property. 451 U.S. at 539–44. The *Hudson* Court extended *Parratt*’s application to all § 1983 due process claims involving deprivation of property, regardless of whether the deprivation is negligent or intentional. *Hudson*, 468 U.S. at 533–36. *Cf. Jefferson v. Jefferson Cnty. Pub. Sch. Sys.*, 360 F.3d 583, 587–88 (6th Cir. 2004) (“If satisfactory state procedures are provided in a procedural due process case, then no constitutional deprivation has occurred despite the injury.”). Following *Parratt* and *Hudson*, the United States Court of Appeals for the Sixth Circuit held that in a § 1983 case “claiming the deprivation of a property interest without procedural due process of law, the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate.” *Vicory v. Walton*, 721 F.2d 1062, 1065–66 (6th Cir. 1983). Where a plaintiff fails to do so, dismissal for failure to state a claim is appropriate. *See, e.g.,*

Gibbs v. Hopkins, 10 F.3d 373, 377-78 (6th Cir. 1993) (dismissal of procedural due process claim upheld where the plaintiff had “not pled or shown that [the state] judicial remedies are inadequate”); *Ruiz v. Fisher*, No. 96-4212, 1998 WL 661139, at *5 (6th Cir. Sept. 2, 1998) (concluding that the plaintiff had failed to state a claim of either intentional or negligent deprivation of property where he had not pled “that state remedies for redressing the wrong [were] inadequate”).

In this case, Plaintiff has failed to sufficiently plead that the post-deprivation tort remedies available to him under Ohio law are inadequate to adjudicate his property-loss claims as required under *Parratt* and *Vicory*. See *Fox v. Van Oosterum*, 176 F.3d 342, 349 (6th Cir. 1999) (citing *Hudson*, 468 U.S. at 534–36) (“State tort remedies generally satisfy the postdeprivation process requirement of the Due Process Clauses.”). Because Plaintiff’s Complaint provides insufficient factual content or context from which the Court could reasonably infer that Ohio’s post-deprivation tort remedies are inadequate to adjudicate his property-loss claims, it is **RECOMMENDED** that the Court **DISMISS** Plaintiff’s claims pursuant to 28 U.S.C. § 1915(e).

IV.

For the reasons set forth above, Plaintiff’s motion seeking leave to proceed *in forma pauperis* is **GRANTED**. (ECF No. 1.) In addition, Plaintiff may proceed on his individual-capacity Eighth Amendment claims against Defendants Hennes and Capella. Finally, it is **RECOMMENDED** that the Court **DISMISS** Plaintiff’s remaining claims pursuant to § 1915(e)(2). The United States Marshal is **DIRECTED** to serve a copy of Plaintiff’s Complaint and Summonses on Defendants Henness and Capella by certified mail.

PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A Judge of this Court shall make a *de novo* determination of those portions of the Report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a Judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the District Judge review the Report and Recommendation *de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

IT IS SO ORDERED.

/s/ Chelsey M. Vascura
CHELSEY M. VASCURA
UNITED STATES MAGISTRATE JUDGE